87-1101

No.

In The
Supreme Court of the United States
October Term, 1987

GTE SPRINT COMMUNICATIONS CORPORATION,

Appellant,

v.

ROGER D. SWEET, Director of the Illinois Department of Revenue, and JEROME COSENTINO, Treasurer of the State of Illinois,

Appellees.

On Appeal from the Supreme Court of Illinois

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

The Illinois Telecommunications Excise Tax Act imposes a tax on "the privilege of originating or receiving" long distance telephone calls in Illinois. This tax places a 5% assessment on the gross charge for long distance calls which either begin or end in Illinois and which are charged to an Illinois service address, but regardless of where such charges are billed or paid for.

The Illinois statute, acknowledging that other states may likewise seek to tax the long distance calls taxed by Illinois, provides that any taxpayer who pays tax both to Illinois and another state on the same long distance call may obtain an Illinois tax credit. The credit provided by Illinois is not in the amount of the Illinois tax, but is calculated by the amount of the tax the taxpayer has paid to the state other than Illinois. Obtaining this credit is contingent upon the taxpayer proving that the other state tax has been imposed on the same event taxed by Illinois, and that the other tax is "properly due" and has been paid for in the other state. The statute provides no criteria for determining whether another state's tax covers the same activity covered by the Illinois tax, or for determining when a tax in another state is "properly due."

The Illinois tax also places a 5% assessment on the gross charge for calls which occur entirely within the State of Illinois.

The question presented on this appeal is whether the Illinois tax, as applied to interstate long distance telephone calls as described above, violates the Commerce Clause of the Constitution of the United States.

PARTIES TO THE PROCEEDINGS

The parties to the trial proceeding below were as follows: Jerome F. Goldberg and Robert McTigue were original plaintiffs in this suit. J. Thomas Johnson, Director of Revenue for the Department of Revenue of the State of Illinois, was the original defendant below. (Roger D. Sweet has succeeded Johnson as Illinois Director of Revenue and has been substituted herein, pursuant to United States Supreme Court Rule 40.) The following long distance telephone carriers were originally named as nominal defendants: GTE Sprint Communications Corporation, SBS Skyline, Western Union, Max Long Distance, TDX Systems, Inc., MCI Telecommunications Corp., ITT, Allnet Dial 1 Service, Republic Telecom Corporation, U.S. Telecom, AT&T, Electronic Office Centers of America, Inc., and Illinois Bell Telephone. GTE Sprint Communications Corporation ("GTE Sprint"), one of the nominal defendants below, filed a cross-claim against the Illinois Director of Revenue (adding James H. Donnewald, Treasurer of the State of Illinois, as a defendant as well), challenging the validity of the Illinois tax at issue. (Jerome Cosentino has since become Treasurer of the State of Illinois and has been substituted herein, pursuant to United States Supreme Court Rule 40.)

J. Thomas Johnson and James Donnewald took a direct appeal from the trial court to the Illinois Supreme Court. Goldberg, McTigue and GTE Sprint were appellees on that appeal. None of the original nominal defendants below, other than GTE Sprint, participated in the appeal and they have therefore not been named herein as parties.

Goldberg and McTigue subsequently appealed from the judgment of the Illinois Supreme Court, filing a Jurisdictional Statement with this Court on November 20, 1987. GTE Sprint is also appealing from that judgment of the Illinois Supreme Court, and now submits this Jurisdictional Statement pursuant thereto.

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JURISDICTIONAL STATEMENT

GTE Sprint Communications Corporation appeals from the final judgment of the Supreme Court of Illinois, dated June 24, 1987 (with opinion filed July 27, 1987), holding the Illinois Telecommunications Excise Tax Act constitutional under the Commerce Clause of the Constitution of the United States.[1]

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 117 Ill. 2d 493, 512 N.E.2d 1262 and is reprinted in Appendix C to the Jurisdictional Statement already filed in this Court by plaintiffs and appellees below, Jerome F. Goldberg and Robert McTigue. *See Jerome F. Goldberg and Robert McTigue v. Roger D. Sweet, et al.*, No. 87-826 (docketed in the United States Supreme Court Nov. 20, 1987).[2]

The findings and opinion of the Circuit Court of Cook County, Illinois, dated October 22, 1986, are not reported. A copy of the trial court's findings of fact and conclusions of law are included in Goldberg App. E at 18a-24a.

JURISDICTION

This is an appeal from a judgment of the Illinois Supreme Court, holding the Illinois Telecommunications Excise Tax Act ("Tax Act" or "Act") constitutional. This judgment was entered on June 24, 1987. A written opinion supporting this judgment was filed on July 27, 1987.

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[1] The parent company of GTE Sprint Communications Corporation is GTE Communications Services, Inc., a Delaware corporation. GTE Sprint has no subsidiaries (other than wholly-owned subsidiaries) nor any affiliates of its own.

[2] The Goldberg/McTigue Jurisdictional Statement has been filed in order to appeal from the same Illinois Supreme Court judgment from which GTE Sprint now appeals. The Appendices attached to the Goldberg Jurisdictional Statement shall therefore be relied upon herein and referred to as "Goldberg App."

Between the issuance of the June 24 order and the July 27 opinion, GTE Sprint filed a timely petition for rehearing with the Illinois Supreme Court. The Illinois Supreme Court thereafter denied GTE Sprint's Petition for Rehearing, by order of October 5, 1987. A copy of the court's denial is included in the Appendices hereto (hereafter "Sprint App."). Sprint App. B at 6a. GTE Sprint subsequently filed its Notice of Appeal from the June 24 judgment with the Illinois Supreme Court, on December 8, 1987. Sprint App. A at 1a. GTE Sprint now submits its Jurisdictional Statement, within 90 days of the denial of its Petition for Rehearing, in order to appeal the judgment of the Illinois Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Commerce Clause, United States Constitution: "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States. . . . " Art. I, § 8, cl. 3.

The full text of the Illinois Telecommunications Excise Tax Act, Ill. Rev. Stat. ch. 120, §§ 2001-2021 (1985) is set forth in Goldberg App. F at 25a-47a.

The relevant text of several state taxing statutes and municipal ordinances, not directly at issue but referred to herein, are included as Sprint Appendices D through H at 11a-22a.

HOW THE FEDERAL QUESTION WAS RAISED

Jerome F. Goldberg and Robert McTigue, as plaintiffs below, raised the claim that the Illinois Telecommunications Excise Tax Act violated the Commerce Clause of the United States Constitution, as well as certain provisions of the Illinois constitution. Nominal defendant GTE Sprint, in a cross-claim against the State of Illinois, likewise asserted that the Tax Act violated the Commerce Clause.

The State of Illinois subsequently filed a motion for summary judgment, requesting that the court find the Tax Act constitutional under both the federal and Illinois constitutions. Goldberg/McTigue and GTE Sprint then filed cross-motions for summary judgment, GTE Sprint requesting partial summary judgment on the Commerce Clause ground alone. In its findings and conclusions on the cross-motions for summary judgment, the trial court stated that the "Illinois [Tax] Act violates the commerce clause of the [United States] Constitution," granting GTE Sprint's motion. Goldberg App. E at 22a and 24a.

The State of Illinois then appealed this decision directly to the Illinois Supreme Court, as provided by Illinois law. In an order entered June 24, 1987 and subsequent opinion filed July 27, 1987, the Illinois Supreme Court found the Tax Act valid, specifically holding that "the [Illinois] tax is valid under the commerce clause." Goldberg App. C at 14a; Goldberg App. D at 17a. The Illinois Supreme Court thus considered and expressly rejected GTE Sprint's federal claim.

STATEMENT OF THE CASE

A. GTE Sprint's Interstate Business and Operations [3]

GTE Sprint Communications Corporation is a retailer of intrastate and interstate telecommunications services. Sprint App. C at 7a. A large portion of GTE Sprint's business consists of providing paying customers interstate voice transmission services, by telephone, in all fifty states of the United States and in several foreign countries. Sprint App. C at 7a. In order to provide these services, GTE Sprint has established, over the years and at great expense, its own

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[3] An affidavit submitted by GTE Sprint in the trial court, detailing certain aspects of its operations, has never been challenged by the State of Illinois and has been attached to the Appendices hereto as part of the record necessary for an understanding of this appeal. Sprint App. C at 7a-10a.

interstate transmission network comprised of microwave radio, fiber optic, satellite and cable facilities, spread over numerous states. Sprint App. C at 7a-8a.

In transmitting voice messages on an interstate basis, GTE Sprint utilizes its own transmission facilities where possible. However, GTE Sprint must also purchase the services of other telecommunications carriers to complete its transmissions in certain areas its network does not reach. Sprint App. C at 8a.

The total costs GTE Sprint incurs in sending its interstate transmissions stem from several sources — from the costs of building and maintaining its interstate lines, the costs of sending transmissions over its interstate lines, the cost of purchasing the use of other carriers' lines in numerous other states where Sprint has not built lines, and the cost of access charges which must be paid to other carriers to pick up and drop off calls at the local level. Sprint App. C at 8a–9a. These are costs which GTE Sprint incurs in sending each interstate transmission and which emanate from activities occurring in each of the states involved in the path of the interstate transmission. Sprint App. C at 8a–9a.

These costs of interstate transmission are recovered by GTE Sprint from its customers in the tariffed prices the customers pay for telecommunications services. The customer's charge for an interstate toll call varies according to duration of the call and the distance between the place the call originates and the place it terminates; the call increases in price both as the duration of the call and the distance between these points increases. The transmission costs to GTE Sprint on long distance calls also increase the further it must transmit each such call. Sprint App. C at 9a.

GTE Sprint is capable, from an administrative viewpoint, of billing more than one state's tax on a single interstate communication. For example, GTE Sprint, in billing

to an Illinois address for an interstate transmission originating in Illinois and terminating in New York, could include in the charge for that call not only a tax assessed by Illinois, the originating state, but also a tax assessed by New York, the terminating state, as well as any other tax assessed by any one of the other states on the call's transmission path. Sprint App. C at 9a.

GTE Sprint's intrastate telecommunications services are provided pursuant to tariffs authorized by the Illinois Commerce Commission, while its interstate telecommunications services are common carrier services subject to Federal Communications Commission regulation, under 47 U.S.C. §§ 153(e), 201 *et seq.* Sprint App. C at 9a.

B. The Illinois Telecommunications Excise Tax Act

Section 4 of the Illinois Telecommunications Excise Tax Act states:

> [A] tax is imposed upon the *act or privilege of originating in this State or receiving in this State interstate telecommunications* by a person in this State *at the rate of 5% of the gross charge* for such telecommunications purchased at retail from a retailer by such person.

Goldberg App. F at 29a, Ill. Rev. Stat. ch. 120, § 2004 (1985) (emphasis added). In a previous clause, "gross charge" is defined as "the amount paid for the act or privilege of originating or receiving telecommunications in this State. . . ." Goldberg App. F at 25a; Ill. Rev. Stat. ch. 120, § 2002(a) (1985). And "amount paid" is defined under the Act as "the amount charged to the taxpayer's service address in this State *regardless of where such amount is billed or paid.*" Goldberg App. F at 26a; Ill. Rev. Stat. ch. 120, § 2002(b) (1985) (emphasis added).

Section 4 of the Act contemplates that states other than Illinois will impose taxes on the same interstate calling activity taxed by Illinois and provides the following

credit provision for those situations:

> To prevent actual multi-state taxation of the act or privilege that is subject to taxation under this paragraph, any taxpayer, *upon proof* that that taxpayer has paid a tax in another state *on such event, shall be allowed a credit* against the tax imposed in this Section 4 *to the extent of the amount of such tax properly due and paid in such other state.*

Goldberg App. F at 29a-30a; Ill. Rev. Stat. ch. 120, § 2004 (1985) (emphasis added).

C. GTE Sprint Payments under the Tax Act

Under Section 5 of the Tax Act, the ultimate consumers of telecommunications services are held liable for the payment of the tax. However, a retailer of telecommunications services is held equally liable for the tax on the long distance call services it sells, whether or not that retailer has actually collected the tax. Goldberg App. F at 30a; Ill. Rev. Stat. ch. 120, § 2005 (1985).

From about September 15, 1985 to July, 1986, GTE Sprint paid to the State of Illinois approximately $2,600,000.00 in taxes allegedly due the State under the Illinois Telecommunications Excise Tax. At least $400,000.00 of this amount Sprint paid itself, rather than collecting it from its customers. Sprint App. C at 10a.

D. This Lawsuit

Plaintiffs Goldberg and McTigue filed this lawsuit against the State of Illinois on August 13, 1985, challenging the constitutionality of the Tax Act under the United States and Illinois constitutions. GTE Sprint was named as a nominal defendant in this suit, being a retailer responsible for collecting the tax. GTE Sprint filed a cross-claim against the State of Illinois, attacking the tax under the Commerce Clause of the United States Constitution. GTE Sprint simultaneously moved, under Illinois statute, to have the amounts it paid under the Tax Act placed into a protest fund, in order to preserve its right to a refund of its

payments if the Tax Act were ultimately declared unconstitutional. *See* Ill. Rev. Stat. ch. 127, § 172 (1985). The trial court granted GTE Sprint's motion and established a fund into which both GTE Sprint's and Sprint's customers' tax payments were and are being paid.

GTE Sprint subsequently filed a cross-motion for summary judgment on the validity of the tax under the Commerce Clause. The trial court, construing the tax as one on interstate calling activity, found that the Act failed to pass at least three of the four tests to be applied in a Commerce Clause challenge to a tax on interstate activity, as reflected in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Goldberg App. E at 18a, 22a and 24a.

The State of Illinois appealed this decision directly to the Illinois Supreme Court, which reversed the trial court's decision. In doing so, the Illinois Supreme Court agreed with the trial court that the tax was assessed against interstate activity, and that, to survive constitutional muster, the tax must have sufficient nexus with the taxing state, must be apportioned to activity within the taxing state, must not discriminate against interstate commerce and must bear a fair relation to services provided by the taxing state, under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Goldberg App. C at 9a, 10a and *passim*. Significantly, the court, in applying these tests, held that the Illinois tax failed two of them, *i.e.*, apportionment and discrimination. The court nevertheless upheld the tax by finding that the apportionment test is constitutionally dispensable and that the tax's discriminatory effect is "cured" by its tax credit provision. Goldberg App. C at 11a–13a. The Illinois Supreme Court thus concluded that the Illinois tax passed, in a fashion, the *Complete Auto* tests and "is [therefore] valid under the commerce clause." Goldberg App. C at 14a.

THE QUESTION PRESENTED IS SUBSTANTIAL

The question of whether Illinois may place a tax on gross charges for interstate calling activity poses a substantial constitutional question which should be addressed by this Court for several reasons. First, the issues presented by the imposition of the Illinois tax are novel ones; this Court has never scrutinized a tax such as the Illinois tax under Commerce Clause strictures. Second, precedent in the area of state taxation on interstate activities suffers from a general lack of clarity, so review of the question presented on this appeal is greatly needed to give states guidance. Third, the issue of the legality of state taxes on interstate phone communications is of enormous import, given the proliferation of such communications in recent years. *See* Jurisdictional Statement, *Goldberg v. Sweet*, No. 87–826 at 25, fn. 21. Finally, and most important, the lower court repeatedly erred in finding that the Illinois tax on long distance calls is constitutional under the Commerce Clause. As a consequence, compelling reasons exist for this Court not only to note probable jurisdiction on this appeal — but to reverse the judgment of the Illinois Supreme Court.

I. The Imposition of the Illinois Tax Violates the Commerce Clause

A. The Tax Is Applied to Interstate Activity

The imposition of any state tax on interstate activity raises the question of whether the tax contravenes limits on state interference with free trade set by the Commerce Clause of the United States Constitution. *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829, 2838–2839 (1987). If the Illinois Telecommunications Excise Tax Act is construed as applying to interstate activity, it follows, then, that a substantial Commerce Clause issue has been raised by the application of that tax.[4]

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[4] GTE Sprint has standing to challenge the Illinois tax under

(Footnote continued on the following page)

The Illinois tax states that "a tax is imposed upon the *act or privilege of originating* in this State *or receiving* in this State *interstate telecommunications*." Goldberg App. F at 29a; Ill. Rev. Stat. ch. 120, § 2004 (1985) (emphasis added). Since interstate transmission is the very predicate and simultaneous necessity of 'originating or receiving' a long distance telephone call, the tax has clearly been laid on inherently interstate activity. Indeed, the Illinois Supreme Court (as did the trial court) acknowledged this fact by construing the taxable event under the Act as interstate activity. Goldberg App. C at 9a; Goldberg App. E at 20a–22a. Since this Court has traditionally deferred to state courts' construction of taxing statutes, there is every likelihood that this Court will conclude that the tax is applied to interstate activity, as well. *See, e.g., Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 84-85 (1948); *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604, 609 (1938).[5]

Further, it is unlikely that the State of Illinois' arguments below — that the tax is imposed on instate, as opposed to interstate, activity — will dissuade this Court from adopting the state courts' construction of the tax. For example, the State, ignoring the plain language of the statute, argued that, because the Tax Act is limited to long

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[4] *(continued)*
the Commerce Clause. *See* Statement of the Case, *supra* at 6-7; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984).

[5] It is also likely that this Court will construe the taxed activity as interstate in nature since the taxed activity has been so construed in other contexts. *See, e.g., Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 661 (1948) (state's gross receipts tax on receipts from transportation which began and ended in New York but traversed other states was tax on "interstate commerce"); *Telegraph Co. v. Texas*, 105 U.S. 460, 465 (1881) ("occupation" tax on receipts of company sending telegraph messages across state lines was tax on interstate messages). Further, the communications taxed by Illinois are regulated by the F.C.C. as "interstate" activity. *See* Statement of the Case, *supra* at 5.

distance calls which are *charged* to a "service address" in Illinois, the tax is a local "sales" tax. But this characterization of the tax ignores the plain language of the statute which taxes the "privilege" of calling; it ignores the practical reality of the tax, which is to tax the calling activity, *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) (the "practical operation" of a tax controls in assessing its constitutionality); and, in any event, it ignores the fact that the tax cannot be deemed to tax a local "sales" transaction, as it explicitly taxes long distance calls even when they are *billed and/or are paid for outside Illinois*. Goldberg App. F at 25a–26a; Ill. Rev. Stat. ch. 120, § 2002(b) (1985). This Court will thus likely agree with the state courts and conclude that the tax applies to interstate activity.

B. The Tax Fails To Comply with Commerce Clause Requirements

If the Illinois tax is interpreted, as it should be, as a tax on interstate activity, substantial Commerce Clause issues come into play. *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829, 2832 (1987). The Commerce Clause of the United States Constitution has traditionally been interpreted by this Court as limiting the state's taxing power over interstate activity and requiring that such state taxes (a) be assessed only on that portion of the activity which occurs within the taxing state; (b) be assessed in such a way as not to discriminate against interstate commerce; and (c) be fairly related to services provided by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) ("*Complete Auto*"); *see also Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). In applying these tests to the Illinois tax, serious questions arise as to the ability of the tax to meet any of these tests, both despite and in light of the Illinois Supreme Court decision finding the tax constitutional.

1. The Tax Is Not Apportioned

A tax on interstate activity, to meet Commerce Clause requirements, must be apportioned to that segment of the interstate activity which occurs within the taxing state. *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984); *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 662–63 (1948). The Illinois Supreme Court has already found that the Illinois tax utterly fails the apportionment test since it is not even vaguely limited to that portion of interstate calling activity which occurs in Illinois. As the court acknowledged, "[s]ince the instant tax applies to the entirety of [the gross charge for] each and every interstate telecommunication, it is not an apportioned tax." Goldberg App. C at 10a.

Applicable precedent confirms that the tax is unapportioned. For example, in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948), New York passed a tax on the gross receipts from transportation which, though it originated and terminated in New York, was also routed through New Jersey and Pennsylvania. This Court nevertheless stated that the New York tax would be void under the Commerce Clause, unless it were apportioned, *i.e.*, limited to some percentage of the receipts equal to that percentage of the multi-state transportation which occurred in New York. The Illinois tax at issue here is the equivalent of that unapportioned New York gross receipts tax on interstate travel; just as the New York tax sought to tax gross charges for interstate transportation so, too, here Illinois seeks to tax gross charges for interstate communication. The Illinois tax, like the New York tax, does not limit itself to that portion of the charges which reflects that portion of the interstate activity occurring in the taxing

state.[6] Therefore, the Illinois tax fails the *Complete Auto* apportionment test.

A recent discussion of apportionment by this Court further underscores the apportionment deficiency of the Illinois tax. In *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983) (*"Container"*), the Court examined a corporate franchise tax applied to the income of businesses engaged in interstate activity. Being applied to income from interstate activity, the tax included an apportionment formula for determining that segment of income which could be attributed to—and therefore taxed by—the taxing state. The Court, in assessing the formula, held that, to be valid, the formula must have "external consistency," that is, the factors used in the formula to divide income attributable to instate activity, which is taxable, from income attributable to out-of-state activity, which is not taxable, "must actually reflect a reasonable sense of how income is generated." *Container*, 463 U.S. at 169.

It is obvious, however, that the Illinois tax fails this external consistency test. GTE Sprint submitted uncontested evidence below that the gross charge for an interstate call is generated not only by the use and cost of Illinois facilities but by the use and cost of significant out-of-state facilities as well. *See* Statement of the Case, *supra* at 4. But the Illinois tax is nevertheless assessed against the *entire* gross charge for a long distance call; there is no attempt to divide the gross charge, according to a realistic sense of how it is generated, between instate and out-of-state activity—and tax only that part which can be

[6] The fact that Illinois only taxes charges charged to an Illinois service address does not apportion the tax. In *Central Greyhound* the New York tax was deemed objectionable even though the tax was limited to those receipts collected by the bus company in New York. *Central Greyhound Lines, Inc. v. Mealey*, 266 A.D. 648, 44 N.Y.S.2d 652, 654 (App. Div. 1943), *aff'd*, 696 N.Y. 18, 68 N.E.2d 855 (1946), *rev'd*, 334 U.S. 653 (1948).

said to be generated by Illinois activity or costs. As a consequence, the Illinois tax has no "external consistency," and is therefore unconstitutional under *Container*.[7]

As noted, the Illinois Supreme Court arrived at this same conclusion. However, the court did not strike down the tax on this basis. It reasoned, instead, that apportionment of a tax on interstate activity is simply not required if the tax otherwise avoids working discrimination against interstate commerce. But this Court, in *Complete Auto*, expressed the Commerce Clause tests to be applied to a tax on interstate activity in the conjunctive, so it appears that, contrary to the Illinois court's conclusion, the apportionment test cannot be so eliminated. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). In addition, this Court has elsewhere stated that the failure of a tax to apportion itself to instate activity portends, in itself, prohibited discrimination. *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984) ("A tax that unfairly apportions income from other States is a *form of discrimination* against interstate commerce." (emphasis added)).[8] As a result, the Illinois Supreme Court has erred. At the least, the Illinois

[7] Although this Court, in *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978), has held that a tax need not be perfectly apportioned, *Moorman* cannot support the validity of the Illinois tax because the Illinois tax has *no* apportionment formula. Compare, for example, a true apportionment formula, as contained in the current Florida tax on private line long distance calls, with the approach taken by the Illinois tax. The Florida tax is assessed only on a percentage of the charge for each interstate private line long distance call, determined according to that percentage of the total distance of the call which falls within Florida. The purpose of this apportionment is "to ensure that no more than 100% of the interstate charge can be taxed by this state and another state." Fla. Stat. Ann. § 212.005(e)2 (West 1987 General Laws Special Service); Sprint App. D at 11a-13a.

[8] In concluding that apportionment of a tax is not necessary if the tax is not "discriminatory," the Illinois Supreme Court relied

(Footnote continued on the following page)

Supreme Court's decision raises legal questions of constitutional significance which must be addressed—that is, whether the fair apportionment requirement of *Complete Auto* can be eliminated and, if it cannot, whether the Illinois tax on the gross charge for long distance calls can meet that requirement.

2. The Tax Discriminates against Interstate Commerce

Even if this Court were to conclude that the Illinois Supreme Court was correct in eliminating the apportionment test of *Complete Auto*, the application of the third *Complete Auto* test by the Illinois Supreme Court still raises substantial and novel constitutional issues. Under that test, a tax on interstate activity cannot operate so as to discriminate against interstate commerce. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977). GTE Sprint contended below that the tax failed this test because the tax effected discrimination against interstate commerce in two ways: First, the Illinois tax creates potential and actual taxation of the same interstate calling

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8 *(continued)*

on a Wisconsin state court case declaring a tax on interstate calling valid, *Wisconsin Telephone Co. v. Wisconsin Department of Revenue*, 125 Wis. 2d 339, 371 N.W.2d 825 (Ct. App. 1985), as well as on *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983) and *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). Goldberg App. C at 10a–11a. Not only is the Wisconsin case factually distinguishable from this case, but the Wisconsin court applied legal standards which have been categorically disapproved by this court in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984). *See* discussion *infra* at 20, fn. 12. Further, neither *Container* nor *Japan Line* supports the elimination of the apportionment requirement. Indeed, in both those cases, the Court states that a failure to apportion will most likely lead to discrimination. These statements are, in fact, virtual rebuttals of the Illinois court's contention that the apportionment requirement is expendable. *Container*, 463 U.S. at 170-71; *Japan Line*, 441 U.S. at 447.

activity by Illinois and other states, while purely intrastate calling activity is not exposed to such multiple burdens; and, second, although Illinois applies a 5% tax on both intrastate and interstate calls, this taxing scheme effectively taxes interstate calling more heavily than intrastate calling. The fact that the Illinois high court dismissed these two arguments, along with the manner in which it dismissed them, raises questions of substantial impact which this Court should address.

a. The Tax Discriminates by Imposing Multiple Burdens

Taxes which create even a risk of multiple taxation on the same interstate activity have traditionally been viewed as discriminatory and as imposing undue burdens on interstate commerce. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 255–56 (1938); *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 360 (1944)("the risk of multiple taxation creates the unconstitutional burden which actual taxation by [more than one state] would impose in fact"). This Court has recently reiterated and reinforced its position that a tax on interstate activity will be void if hypothetical, "like" taxes could be imposed by other states on the same activity. *Armco Inc. v. Hardesty*, 467 U.S. 638, 644–45 (1984) ("*Armco*"). *Accord Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984).

Applying the *Armco* holding here, it is clear that the Illinois tax should be invalidated. For example, Illinois assesses its tax on the total charge for the act or privilege of originating or receiving an interstate call in Illinois, if the call is charged to an Illinois service address. But Illinois taxes the call even if that call is billed or paid for in another state. *See* Statement of the Case, *supra* at 5. Suppose now a call from Illinois to New York. And suppose a New York tax *like* the Illinois tax—*i.e.*, one which covers calls originating or terminating in New York, where those calls are billed or paid for in New York. If a call is then

made from Illinois to New York, Illinois could tax the call because it begins in Illinois and could be charged to an Illinois address; but New York could also tax the call because the call terminates in the State of New York and the call, though charged to an Illinois address, might be either billed or paid for in New York.[9] Further, GTE Sprint has submitted uncontested facts which demonstrate that it could apply both the Illinois and New York tax, in this instance, to the same call. *See* Statement of the Case, *supra* at 4-5. *Ergo*, multiple taxation on the same charge for the very same call. Under *Armco*, the tax should therefore fall.

Even without relying on the *Armco* "hypothetical" test, however, it is clear that the Illinois tax is invalid since jurisdictions other than Illinois are already actually applying "like" taxes on the very calls taxed by Illinois. Although a showing of such instances of actual multiple taxation is not *necessary* to invalidate the Illinois tax, such a showing surely dooms it. *See American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829, 2841 (1987).

And such a showing is easy to make. For example, taxes have been levied on interstate telecommunications services in other states, which, when combined with the Illinois tax, produce multiple taxation of the same activity. The City of Wheat Ridge, Colorado, a Denver suburb, has enacted an ordinance which applies a sales tax to "interstate and intrastate telecommunications service originating from or received on telecommunications equipment in this City if the charge for the service is billed to a person in this City or *billed to an affiliate or division of such person in any state/city on behalf of a person in this City*." City of Wheat Ridge, Colorado Ordinance No. 630, § 2(b) (Aug. 12, 1985) (emphasis added); *see* Sprint App. E

[9] For example, a call might be *charged* to a phone at the Illinois division of a New York corporation, but the bill *paid* at corporate headquarters in New York.

at 14a-15a. Under this ordinance, a corporation headquartered in Chicago, with a branch office in Wheat Ridge, is subject to the Wheat Ridge tax on the gross charge for an interstate transmission between Wheat Ridge and Chicago, over GTE Sprint facilities, where the call is "billed" to Chicago corporate headquarters (an "affiliate"). But the charge for that call could also be taxed by Illinois because the call would have originated from or been received in Illinois and could also have been "charged" to an Illinois service address, *i.e.*, the Chicago corporate headquarters. The City of Greeley, Colorado has enacted an identical tax. Greeley City Ordinance No. 45, Sec. 1 (May 7, 1985); *see* Sprint App. F at 16a. There are other instances of other states' taxation of interstate calls originating or terminating in Illinois.[10]

The imposition of these taxes, together with the Illinois tax, can and do bring about multiple taxation of the same calling activity. Under the Illinois Act, Illinois has taxed the full stretch of an interstate transmission. But other states inevitably involved in the transmission of the same interstate call have equal right to assess taxes on

[10] Instances of actual multiple taxation result not only from other states' "sales" taxes. For example, Washington has passed a tax on the *privilege* of engaging in interstate phone calls. Wash. Rev. Code Ann. §§ 82.04.065 and 82.04.250 (1981 and Supp. 1987); Sprint App. G at 17a-19a. This tax is applied to the gross proceeds from all long distance calls originating or terminating in Washington state, where such calls are billed or paid for in Washington. As a consequence, a long distance call from Illinois to Washington and charged to an Illinois address, but paid for in Washington, could be taxed by both Illinois and Washington.

New Mexico also has a tax on the "privilege" of engaging in long distance phone calls. New Mexico places a tax on 65% of the gross receipts from calls originating or terminating in New Mexico. N.M. Stat. Ann. §§ 7-9-3, 7-9-4 and 7-9-56 (1986 and Supp. 1987); Sprint App. H at 20a-22a. This tax, in combination with the Illinois tax, results in multiple taxation of the same calls.

their own instate portion of it, whether that entails the origination or receipt of the call, the transmission of the call, or aspects of its sale (*e.g.*, "billing and payment"). As a consequence, the Illinois tax imposes an impermissible burden on interstate communications, not borne by instate ones.

The Illinois Supreme Court dismissed the problem of multiple taxation presented by the Illinois tax, adopting a highly convoluted approach. First, the court simply mischaracterized the tax in order to find that, with regard to communications which *originate* in Illinois, no risk of multiple taxation exists.[11] Goldberg App. C at 11a. But there is absolutely no evidence in the record—nor none cited by the court—which would support the court's conclusion that states other than Illinois could not tax calls originating in Illinois, or that the tax coverage differs between calls which originate and calls which terminate in Illinois. Indeed, to the contrary, GTE Sprint has submitted uncontested evidence here and below, in the form of actual taxes, establishing that other jurisdictions can, and do, tax calls taxed by Illinois, whether they begin or end in Illinois. *See* discussion *supra* at 16-17 and fn. 10. The court simply erred in concluding that calls originating in Illinois cannot be taxed by another state.

The Illinois Supreme Court further erred in its reliance on recent Wisconsin and Alaska state court cases

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[11] The Illinois court construed the tax as covering those calls *originating* in Illinois which were "paid for in Illinois or billed to a service address located in Illinois," whereas it construed the tax as covering calls *received* in Illinois only when "billed to a service address in Illinois." Goldberg App. C at 11a. But, plainly, no such distinction exists in the Act. Calls, whether they originate or terminate in Illinois, are taxed under the Act when they are *charged* to an Illinois service address and, *in both instances*, regardless of where they are billed or paid for. Goldberg App. F at 25a-26a and 29a-30a; Statement of the Case, *supra* at 5.

upholding taxes on interstate telephone calls to support its position that calls originating in Illinois could not be subject to possible multiple taxation. *See* Goldberg App. C at 11a. Specifically, the Illinois court relied on the Alaska and Wisconsin courts' construction of their states' long distance phone call taxes as "sales" taxes and those courts' identical findings that those taxes were non-discriminatory because only one state could assess a tax on the "sale" of a long distance call, since the sale would invariably occur at a single location. *See Douglas v. Glacier State Telephone Co.*, 615 P.2d 580, 588 (Alaska 1980) ("*Douglas*"); *Wisconsin Telephone Co. v. Wisconsin Department of Revenue*, 125 Wis. 2d 339, 371 N.W.2d 825, 830 (Ct. App. 1985) ("*Wisconsin Telephone*"). But these state courts' conclusions cannot apply here, for three reasons.

First, the Illinois court has acknowledged that the Illinois tax is *not* a tax on a local sale, but a tax on the privilege of calling which is interstate—not local—in nature. Goldberg App. C at 8a-9a. Second, even if the Illinois tax were construed as a tax on the sale of services, that tax still carries a complication which prevents any conclusion that it avoids imposing a risk of multiple taxation. Specifically, the Illinois tax taxes interstate calls which begin or end in Illinois and which are charged to an Illinois service address, *regardless of where they are billed or paid for.* As a consequence, even if a call originates in Illinois, is charged there and is, therefore, taxed by Illinois, another state where the call terminates and where the call is paid for might also tax the call on the ground that the "sale" occurred there. Third, the Alaska and Wisconsin courts concluded that taxes such as the taxes under consideration there were not likely to be imposed by more than one state because they found that, practically speaking, a carrier could assess only one state's tax on any one long distance call, under the telephone system as it existed then in those states. *Douglas*, 615 P.2d at 588; *Wisconsin Telephone*, 371 N.W.2d at 830. But GTE Sprint has submit-

ted uncontested evidence which demonstrates, that, by contrast, the GTE Sprint system is not a system which functions in the manner the Bell system did in the *Douglas* and *Wisconsin* cases, and that it *can*, administratively, apply more than one state's tax to any interstate call. Sprint App. C at 9a. Thus, the Alaska and Wisconsin cases are no support whatsoever for the Illinois court's conclusion.[12]

Indeed, prior precedent which is pertinent points to the opposite conclusion—that the Illinois tax on long distance calls originating in Illinois *will* be deemed to impose the risk of multiple tax burdens on the same activity. For example, in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954) ("*Michigan-Wisconsin*"), Texas had imposed a tax on the "taking" of the full volume of gas into an interstate pipeline for interstate transmittal—that is, on the "origination" of the interstate flow. The court struck down the tax because, *inter alia*, it posed the risk of multiple taxation. The Court reasoned that, if Texas could place a tax on the origination of the interstate flow of gas, so, too, could the state where the interstate flow was terminated. *Michigan-Wisconsin*, 347 U.S. at 170. Likewise, here, if Illinois is permitted to apply a tax on the gross charge for an interstate call beginning in Illinois, so, too, must the state where the call terminates. As a consequence, the Illinois tax is unconstitutional under proper case authority, and the Wisconsin and Alaska state court cases, neither of

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[12] In addition, both the Alaska and Wisconsin courts' legal reasoning has been rejected. Those courts upheld the taxes at issue because the plaintiffs had failed to demonstrate that the tax imposed *actual* multiple burdens. But, in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), this Court categorically rejected this legal premise and held, instead, that *actual* multiple taxation need not be proven to invalidate a tax on interstate activity. The Wisconsin court also relied heavily on *General Motors Corp. v. Washington*, 377 U.S. 436 (1964) which has since been overturned in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 107 S. Ct. 2810 (1987).

which was reviewed by this Court, do nothing to buttress the Illinois court's erroneous conclusion.

What is even more significant, however, is the fact that the Illinois Supreme Court simply conceded that, with regard to long distance calls that *end* in Illinois, jurisdictions other than Illinois currently *do* tax those same calls. Thus the court, after all its analytical gyrations designed to salvage the tax on calls which originate in Illinois, simply admits that the Illinois tax does impose actual multiple burdens with regard to calls that terminate in Illinois. Goldberg App. C at 12a–13a. This acknowledgment should lead to the inescapable conclusion that the tax is void. *Armco Inc. v. Hardesty*, 467 U.S. 638, 644-45 & n.8 (1984).

The Illinois Supreme Court managed to excuse this otherwise fatal flaw of the tax, however, by holding that the credit provision in the Tax Act "cures" its discriminatory effect. The Illinois credit provision allows a taxpayer who has paid Illinois and another state a tax on the same call activity, a tax credit from Illinois in the amount of the tax paid to that other state (or other states). But this credit mechanism is a totally illusory cure for multiple taxation. First, to obtain the credit, a taxpayer must prove each instance of multiple taxation. *See* Statement of the Case, *supra* at 5-6. Since the Illinois tax represents a tax on charges which are incurred with great frequency, such a proof procedure for each illegal taxing incident constitutes a significant burden in itself. This "cure," GTE Sprint maintains, is as bad as the disease, and increases, rather than decreases, the burdens on interstate commerce the tax imposes.

Second, the refund provision offers only sporadic elimination of prohibited multiple burdens. To illustrate: if State X imposes a tax on the gross charge for a call to Illinois at a rate of 3%, while Illinois imposes a tax on the gross charge for the same call as received in Illinois at

a rate of 5%, the fact that Illinois grants a credit in the amount of 3% of the charge does not negate the fact that the charge for the call is still being taxed by Illinois, without proper apportionment, albeit at a lower—2%—rate. It is only when the taxing state or states other than Illinois actually assess taxes in an amount which, alone or collectively, equals or exceeds the absolute amount of tax assessed by Illinois that the credit eradicates the Illinois tax and thereby eliminates its inherently discriminatory effect. The "cure" is thus totally fortuitous and cannot infallibly eradicate discriminatory taxation. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 76 (1963) (Brennan, J., concurring).

Third, the Illinois tax credit is provided only for taxes assessed by other states which are 'properly due,' and which cover the same activity covered by the Illinois tax. *See* Statement of the Case, *supra* at 5-6. But no clarification of what taxes are 'properly due' or what other taxes will overlap with the Illinois tax is provided by the taxing statute. This provision thus relegates to a taxpayer the burden of proving, in each instance of multiple taxation and without any criteria, that another state's tax is 'properly due,' and that another state's tax overlaps the Illinois tax, before the taxpayer can obtain a credit. Surely, placing this heavy burden on the taxpayer, in order to rectify the constitutional infirmities of a tax, constitutes, in itself, an undue burden on interstate commerce.[13]

The Illinois credit mechanism is totally inadequate to rescue the Illinois tax from its multiple burden infirmity. The Illinois court has conceded that the tax is unconstitutional without the credit mechanism. The tax must

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[13] This Court has itself encountered significant difficulties in sorting out proper from improper state taxes on interstate activity, as well as in identifying 'taxable events.' *See* discussion *infra* at 27. What, then, must be the burden placed on the taxpayer?

fail, as a consequence. At the very least, GTE Sprint's position—whether the credit "cures" the discrimination—poses a significant issue for this Court which deserves plenary review.

b. The Tax Discriminates by Imposing Heavier Burdens on Interstate than on Intrastate Calls

The State of Illinois argued below that the Illinois tax could not be deemed "discriminatory," in any event, because the same or "equal" 5% tax was levied on both interstate and intrastate calls in Illinois. The gist of the argument, apparently, is that Illinois, having applied a 5% tax on instate calls, should also be permitted to impose a 5% tax on interstate calls; in this way, the interstate tax would simply constitute a tax which is "complementary" to the instate tax, just as a use tax is "complementary" to a sales tax. *Cf. Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). The Illinois Supreme Court apparently agreed. Goldberg App. C at 11a. However, that portion of the Illinois tax on interstate calls cannot be justified as a "compensatory" or "complementary" tax.

As this Court has stated, "[t]he concept of a compensatory tax first requires identification of the burden for which the state is attempting to compensate." *Maryland v. Louisiana*, 451 U.S. 725, 758 (1981). Here, the State must claim that the "burden" for which it seeks compensation is the burden of supporting calling facilities and activities. Now, Illinois certainly has an interest in being compensated for the burdens placed upon it by the conduct of activity and operation of facilities within its territory, such as those involved in instate calling. But, Illinois has *no* sovereign interest in being compensated for those activities occurring and facilities run outside its borders, so that it has no right to be compensated for the entirety of each interstate call, part of which invariably involves such out-of-state activity and facilities. The two

different events—instate calling and interstate calling—do not impose comparable burdens on the State. Therefore, an equal tax on the two events does not represent equal treatment, because the burdens imposed on the State by the two are not equivalent.[14]

Indeed, this Court has recognized that the imposition of equal tax rates on intra- and interstate activities does not necessarily signify that the state's taxing scheme is non-discriminatory. *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829, 2842 (1987) (facially equal taxes can nevertheless subject interstate activity to discriminatory multiple burdens). Here, the facially equal taxes are discriminatory. The interstate calls carry a tax burden the intrastate calls do not because, as to interstate calls, the activity occurring outside the state which is being taxed by Illinois is also subject to taxing by other states. Instate calls are not exposed to any such additional burdens. Therefore, the interstate calls are effectively taxed more heavily. This constitutes impermissible discrimination against interstate commerce, under *American Trucking Association, Inc. v. Scheiner*, 107 S. Ct. 2829, 2840–41 (1987) and *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 107 S. Ct. 2810, 2820 (1987).[15]

In any event, the issue of whether the 5%/5% tax treatment of the two different types of calls rescues the taxing statute from its otherwise discriminatory effects raises a significant issue under the Commerce Clause.

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[14] In this respect, the Illinois intra- and interstate tax scheme is totally different from a use/sales tax scheme which applies to tangible personal property sold entirely in one state and then entirely consumed within another. *Cf. Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Interstate service simply does not represent a distinguishable and totally out-of-state counterpart to some totally instate activity, as the "use" of a product outside a state does to the sale of it within another state.

[15] As this Court has stated, "The [local] incident [of interstate

(Footnote continued on the following page)

The trial court found discrimination persisted despite this facial equality, whereas the Illinois Supreme Court did not. Goldberg App. E at 20a–24a; Goldberg App. C at 11a, 16a. This Court should resolve that disagreement.

3. The Tax Is Not Fairly Related to Services Provided by Illinois

A state tax on interstate activity must be "fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). GTE Sprint argued below that the Illinois tax failed this fourth *Complete Auto* test. The Illinois Supreme Court disagreed, concluding that "the services provided by [Illinois] facilitate perhaps the most critical step in the taxable event—interstate origination . . . [while] . . . the benefits afforded by other States in facilitating the same interstate telecommunication are *too speculative* to override the substantial benefits extended by Illinois." Goldberg App. C at 13a (emphasis added). But this finding has no basis in fact or law.

As to the factual basis for the Illinois court's conclusion, GTE Sprint introduced uncontroverted facts below which establish the highly significant role of states other than Illinois in facilitating interstate telecommunications, even where they begin in Illinois. *See* Statement of the Case, *supra* at 4; Sprint App. C at 7a–8a. The state court's conclusion that benefits provided by other states are "speculative" has no basis whatsoever in fact, on this record.

The court also had no legal basis for concluding that the Illinois tax has any fair relation to the support Illinois provides the taxed activity. The fair relation test requires that "the *measure* of the tax must be reasonably related

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15 *(continued)*

commerce] selected [to be taxed] should be one that does not lend itself to repeated exactions in other states. Otherwise intrastate commerce may be preferred over interstate commerce." *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 87 (1948).

to the extent of the contact [the activity has with the taxing state], since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of the state tax burden. [T]he incidence of the tax *as well as its measure* [must be] tied to the earnings which the State . . . has made possible. . . .'" *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981) (citations omitted; emphasis added).

But the measure of the Illinois tax is in no way tied to the earnings or charges which Illinois has made possible with regard to interstate calling. The Illinois tax taxes the entire charge for any long distance call, even though it is clear that not all of that charge is attributable to activities within Illinois. Thus, there is no fair relation between the measure of the tax and the extent of Illinois activity involved in the taxed long distance calls. Further, as GTE Sprint has argued, and supported by uncontested affidavit, the Illinois tax is constitutionally perverse, so to speak, because it tends to tax a call more heavily the less the call involves Illinois activity. Specifically, since calls made over greater distances tend to cost more, GTE Sprint charges more for those calls. And the greater the distance of a call, the more out-of-state or non-Illinois activity tends to be involved. But, because Illinois receives a flat 5% on the gross charge for calls, Illinois tends to receive more revenue on calls the more expensive and longer they are and, therefore, the more they involve activity *outside* the State of Illinois. *See* Statement of the Case, *supra* at 4; Sprint App. C at 8a-9a. The tax therefore operates in direct contradiction to the dictates of the fair relation rule because there is an *inverse* relationship between the amount of Illinois activity involved in a long distance call and the measure of the tax. This insidious inverse relationship should render the Illinois tax unconstitutional. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 627-29 (1981). There is, at least, a substantial issue posed as to whether the Illinois tax can pass the fourth prong of the *Complete Auto* test.

II. The Imposition of the Illinois Tax Raises Substantial Issues which Are Novel, Important and Deserve Review

GTE Sprint has demonstrated that reversal of the Illinois Supreme Court judgment is likely on several grounds and that, therefore, substantial questions of constitutional law have been raised which should be addressed by this Court. But there are additional reasons for plenary review. For example, no similar state tax on long distance telephone calls has previously been evaluated by this Court. Though two state courts have recently considered and upheld the constitutionality of state taxes on long distance calls, neither decision ever reached this Court; both involved taxes which differ facially and in their application from the Illinois tax; and, in both cases, the courts based their decisions on legal premises rejected by this Court. *See* discussion *supra* at 19-20 and fn. 12. Further, despite the utter irrelevance of these prior cases to the issues presented by this appeal, the Illinois Supreme Court relied upon them in upholding the Illinois tax. Review of the issues presented by this appeal is therefore desperately needed, to clarify legal precedent and Commerce Clause law in this generally confusing area of state taxation. *See American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829, 2832 (1987) (noting "uneven course of decisions" in area of Commerce Clause restrictions on state taxation); *McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980) (Powell, Circuit Justice, in chambers) (ambiguity of precedent argues in favor of noting probable jurisdiction).

Full review of GTE Sprint's challenge to the Tax Act is also called for because of the wide-reaching impact of a decision evolving from that review. This tax challenge is important to all those who have come to depend upon the interstate transmission of speech, information, data and images — all of which could be taxed under statutes like the statute at issue here. Further, given the actual proliferation of long distance telecommunications and taxes on

those communications, *see* discussion *supra* at 8, 16-17 and fn. 10, we all need guidance on what our Commerce Clause allows. *Hicks v. Feiock*, 107 S. Ct. 259 260 (1986) (O'Connor, Circuit Justice, in chambers); *National Collegiate Athletic Association v. Board of Regents*, 463 U.S. 1311, 1313 (1983) (White, Circuit Justice, in chambers).

CONCLUSION

In conclusion, the substantiality of the federal question, the likelihood of reversal, the lack of clear precedent, the need for clear guidance, and the widespread importance of the issues raised herein all argue strongly in favor of this Court noting probable jurisdiction and reversing the judgment of the Illinois Supreme Court.

Respectfully submitted,

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APPENDICES

APPENDIX A

No. 64355

In The
Supreme Court of Illinois

JEROME F. GOLDBERG and ROBERT McTIGUE, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees and Cross-Appellants,

v.

J. THOMAS JOHNSON, Director of Revenue for the Department of Revenue of the State of Illinois,
Defendant-Appellant,

and

GTE SPRINT COMMUNICATIONS CORPORATION, et al.,
Defendants.

GTE SPRINT COMMUNICATIONS CORPORATION,
Counter-Plaintiff-Appellee,

v.

J. THOMAS JOHNSON, Director of Revenue for the Department of Revenue of the State of Illinois, and JAMES H. DONNEWALD, Treasurer of the State of Illinois,
Defendants-Appellants.

Direct Appeal from the Circuit Court of Cook County, Chancery Division

No. 85 CH 8081

The Honorable **Richard L. Curry,** Judge Presiding

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that GTE Sprint Communications Corporation, the Counter-Plaintiff-Appellee above-named, hereby appeals to the Supreme Court of the United States the judgment of the Supreme Court of Illinois entered herein on June 24, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

By: /s/ LAURA DI GIANTONIO
Laura Di Giantonio

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CERTIFICATE OF SERVICE

I, Laura Di Giantonio, certify that on December 7, 1987, I caused the Notice of Appeal to the Supreme Court of the United States to be served on all those persons on the attached Service List by causing one true and correct copy to be placed, first class postage prepaid, in envelopes, correctly addressed, and sent by United States Mail.

/s/ LAURA DI GIANTONIO
Laura Di Giantonio

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APPENDIX B

ILLINOIS SUPREME COURT
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October 5, 1987

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No. 64355 - Jerome F. Goldberg, et al., etc., appellees, v. J. Thomas Johnson, Director of Revenue, etc., et al., appellants. Appeal, Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on January 21, 1988.

APPENDIX C

STATE OF ILLINOIS } SS
COUNTY OF COOK }

AFFIDAVIT OF RICHARD N. WILEY

Richard N. Wiley, being over the age of 21 and being competent to testify to the matters herein, deposes and states as follows:

1. I formerly served as Tax Manager and then as Senior Tax Attorney for GTE Sprint Communications Corporation ("GTE Sprint") from 1980-1985.

2. In 1986, GTE Sprint combined with U.S. Telecom, Inc. to form a partnership known as U.S. Sprint Communications Company ("U.S. Sprint"). This partnership was formed to provide long distance telecommunications services in the United States and elsewhere.

3. I am now a General Attorney employed by U.S. Sprint.

4. In my various positions with GTE Sprint and then with U.S. Sprint, I have of necessity become familiar with the operations of those companies.

5. GTE Sprint was, prior to July 1, 1986, a retailer of intrastate and interstate telecommunications services. As U.S. Sprint it so remains. (Hereinafter GTE Sprint and U.S. Sprint will be referred to as "GTE Sprint," in the present tense.)

6. GTE Sprint's customers use its services to convey and receive voice and other messages. A large part of GTE Sprint's business centers on providing interstate voice transmission by telephone, in all fifty states of the United States and to several foreign countries. In order to provide voice transmission services, GTE Sprint has established, over the years, its own interstate transmission network comprised of microwave radio, fiber optic, satellite and

cable transmission facilities which are spread over numerous states. GTE Sprint has constructed this interstate network of transmission facilities at great expense.

7. In transmitting voice messages on an interstate basis, GTE Sprint utilizes its own facilities where possible.

8. However, GTE Sprint must utilize the services of other telecommunications carriers in some areas its lines do not reach. In such cases, GTE Sprint purchases services from these other carriers.

9. GTE Sprint is also forced to use other carriers' services at the local level since local operating companies control the facilities which are used to originate and terminate calls. For example, GTE Sprint typically pays the local exchange telephone company (usually a Bell Operating Company) at the originating end of a transmission for picking up the communication from its origin (generally the caller's telephone device) and delivering it to the GTE Sprint network. Likewise, at the terminating end of the communication, GTE Sprint typically pays another local exchange telephone company for delivering the communication from the GTE Sprint network to the point of termination.

10. The local exchange services for this purpose are termed "access services" and the charges for using the local exchange services for picking up and dropping off the message at the local level are termed "access charges."

11. Other costs are incurred by GTE Sprint in the establishment and maintenance of its own network over which its customers' calls are transmitted where possible. GTE Sprint thus incurs costs in sending its interstate transmissions, both in the cost of building and maintaining its own lines, and in purchasing services from other carriers.

12. GTE Sprint incurs transmission costs over the entire pathway of each communication. The transmis-

sion and other costs incurred are typically recovered from GTE Sprint's customers in the tariffed prices they pay for telecommunications services. The basic charge for an interstate toll call varies according to the distance between the place the call originates and the place it terminates, increasing in price as the distance between these points increases. The charge for an interstate private line call varies solely according to the length of the line utilized in the transmission.

13. GTE Sprint's intrastate telecommunications services are provided pursuant to tariffs authorized by the Illinois Commerce Commission, while its interstate telecommunications services are common carrier services provided subject to Federal Communications Commission regulation and pursuant to 47 U.S.C. § 201 *et seq.*

e14. GTE Sprint has the administrative capability to bill taxes to its customers on telecommunications services which originate in any state, or terminate in any state, or are billed in any state, or any combination of these criteria for any number of states. Specifically, GTE Sprint has the administrative capability to bill more than one state's tax to a single customer for a single communication. For example, GTE Sprint can bill an Illinois customer for an interstate telecommunication originating in Illinois and terminating in New York, and could include, in that charge, a tax assessed by Illinois, the originating state, and New York, the terminating state.

15. The first payment of the excise tax imposed by the Illinois Telecommunications Excise Tax Act was due the State of Illinois on September 15, 1985. Because of certain business and technical exigencies, GTE Sprint was not able, at that time, to implement a system to pass the tax through to its customers on their bills. Therefore, GTE Sprint undertook to remit to the State the taxes due under the Act, until such time as it could implement such a system. GTE Sprint made a number of the tax payments

itself thereafter, until it was finally able to implement a system to pass the tax on to its customers, around October or November, 1985.

16. From September 15, 1985 to the present, GTE Sprint has paid to the State of Illinois a total of $ 2,146,904.28 in taxes due the State by its customers for interstate telecommunications services, at least $ 391,568.00 of which has been paid by Sprint itself, and not its customers, due to Sprint's temporary administrative inability to pass along the tax.

17. These payments GTE Sprint has made under protest, pursuant to Illinois statutory provision, in order to preserve its right to a refund of those payments should the Tax Act ultimately be declared unconstitutional in this lawsuit.

18. GTE Sprint has met all the requirements for requesting a refund under the Money Disposition Act, as it filed suit challenging the tax within the specified time period, obtained the required injunction, and has paid over the tax to the State, under protest, and accompanied by the required protest form.

/s/ RICHARD N. WILEY
Richard N. Wiley

Subscribed and sworn to
before me this 25th day
of July, 1986.

/s/ COLLEEN C. JARDINE
Notary Public
[Seal]

APPENDIX D

FLORIDA SALES TAX

212.05. Sales, storage, use tax

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

* * * *

(e)1. At the rate of 5 percent on charges for all telegraph messages and long distance telephone calls beginning and terminating in this state; on charges for telecommunication service as defined in s. 203.012 and for those services described in s. 203.012(2)(a); on recurring charges to regular subscribers for wired television service; on all charges for the installation of telecommunication, wired television, and telegraphic equipment; and on all charges for electrical power or energy. For purposes of this subparagraph, the term "telecommunication service" does not include local service provided through a pay telephone. The provisions of s. 212.17(3), regarding credit for tax paid on charges subsequently found to be worthless, shall be equally applicable to any tax paid under the provisions of this section on charges for telecommunication or telegraph services or electric power subsequently found to be uncollectible. The word "charges" in this paragraph does not include any excise or similar tax levied by the Federal Government, any political subdivision of the state, or any municipality upon the purchase or sale of telecommunica-

tion, wired television, or telegraph service or electric power, which tax is collected by the seller from the purchaser.

2. Telegraph messages and telecommunication services which originate or terminate in this state, other than interstate private communication services, and are billed to a customer, telephone number, or device located within this state are taxable under this paragraph. Interstate private communication services are taxable under this paragraph as follows:

a. One hundred percent of the charge imposed at each channel termination point within this state;

b. One hundred percent of the charge imposed for the total channel mileage between each channel termination point within this state; and

c. The portion of the interstate interoffice channel mileage charge as determined by multiplying said charge times a fraction, the numerator of which is the air miles between the last channel termination point in this state and the vertical and horizontal coordinates, 7856 and 1756, respectively, and the denominator of which is the air miles between the last channel termination point in this state and the first channel termination point outside this state. The denominator of this fraction shall be adjusted, if necessary, by adding the numerator of said fraction to similarly determined air miles in the state in which the other channel termination point is located, so that the summation of the apportionment factor for this state and the apportionment factor for the other state is not greater than one, to ensure that no more than 100 percent of the interstate interoffice channel mileage charge can be taxed by this state and another state.

3. The tax imposed pursuant to this paragraph shall not exceed $50,000 per calendar year on charges to any person for interstate telecommunications services defined in s. 203.012(4) and (7)(b), if the majority of such services used by such person are for communications originating

outside of this state and terminating in this state. This exemption shall only be granted to holders of a direct pay permit issued pursuant to this subparagraph. No refunds shall be given for taxes paid prior to receiving a direct pay permit. Upon application, the department may issue a direct pay permit to the purchaser of telecommunications services authorizing such purchaser to pay tax on such services directly to the department. Any vendor furnishing telecommunications services to the holder of a valid direct pay permit shall be relieved of the obligation to collect and remit the tax on such service. Tax payments and returns pursuant to a direct pay permit shall be monthly. For purposes of this subparagraph, the term "person" shall be limited to a single legal entity and shall not be construed as meaning a group or combination of affiliated entities or entities controlled by one person or group of persons. For purposes of this subparagraph, for calendar year 1986, the term "calendar year" means the last 6 months of 1986.

APPENDIX E

ORDINANCE NO. 630

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF WHEAT RIDGE, COLORADO THAT:

Section 1. Section 21-1 – Definitions of the Code of Laws of the City of Wheat Ridge is amended by the addition of the following definitions:

"LOCAL EXCHANGE COMPANY" means any person which provides public telephone or telecommunication exchange access lines, mobile telecommunications or channels necessary to effect the transfer of two-way voice or data grade information between the final user and the local telecommunications network.

"TELECOMMUNICATIONS SERVICE" means the transport of signs, signals, writings, images, sounds, messages, data, or other information of any nature by wire, radio, light waves, electromagnetic, digital, or electronic means.

"ACCESS SERVICES" means any charge by local telephone exchange companies to providers of telecommunications services for use in providing their telecommunications services.

Section 2. Section 21-4 - Property and Services Subject to Tax of the Code of Laws of the City of Wheat Ridge is amended by the repeal and reenactment of the following provisions thereof:

There is hereby levied and there shall be collected and paid a tax in the amount stated in Section 21-7 as follows: on all sales and services taxable by the State of Colorado under the sales tax provisions of the Colorado Revised Statutes 1973, 39-26-104, as amended, including, not limited to the following:

(b) UPON TELECOMMUNICATIONS SERVICES, EXCEPT ACCESS SERVICES AS DESIGNATED IN SECTION 21-5(8), WHETHER FURNISHED BY PUB-

LIC OR PRIVATE CORPORATIONS OR ENTERPRISES FOR ALL INTERSTATE AND INTRASTATE TELECOMMUNICATIONS SERVICE ORIGINATING FROM OR RECEIVED ON TELECOMMUNICATIONS EQUIPMENT IN THIS CITY IF THE CHARGE FOR THE SERVICE IS BILLED TO A PERSON IN THIS CITY OR BILLED TO AN AFFILIATE OR DIVISION OF SUCH PERSON IN ANY STATE/CITY ON BEHALF OF A PERSON IN THIS CITY.

Section 3. Section 21-5. Same - Exempt of the Code of Laws of the City of Wheat Ridge is hereby amended by the addition of the following subpart 21-5(i) (8):

(8) "ACCESS SERVICES" BY LOCAL TELEPHONE EXCHANGE COMPANIES TO PROVIDERS OF TELECOMMUNICATIONS SERVICE FOR USE IN PROVIDING SUCH SERVICE SHALL BE DEEMED TO BE WHOLESALE SALES AND SHALL BE EXEMPT FROM TAXATION UNDER THIS SECTION.

SIGNED by the Mayor on this 12th day of August, 1985.

/s/ FRANK STITES
Frank Stites, Mayor

ATTEST:
/s/ WANDA SANG
Wanda Sang, City Clerk

APPENDIX F

CITY OF GREELEY, COLORADO
ORDINANCE NO. 45, 1985

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF GREELEY, COLORADO:

Section 1. Section 4.04.060 of the Code of Ordinances, a copy of which is attached hereto, marked "Exhibit A" and incorporated herein by reference, is amended to read as follows:

4.04.060 Sales tax–Levied. There is levied and there shall be collected and paid a tax in the amount stated in Section 4.04.145 as follows:

C. Upon telecommunications services, except access services as designated in Section 4.04.015 (S), whether furnished by public or private corporations or enterprises for all interstate and intrastate telecommunications services originating from or received on telecommunications equipment in this city if the charge for the service is billed to a person in this city or billed to an affiliate or division of such person in any state or any other city in this state on behalf of a person in this state;

R. "Telecommunications Service" means the transport of signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio, light waves, electromagnetic, digital, or electronic means.

S. "Access Services" means any charge by local telephone exchange companies to providers of telecommunications services for use in providing their telecommunications services.

Section 2. This Ordinance shall become effective on July 1, 1985.

PASSED AND ADOPTED, SIGNED AND APPROVED THIS 7th DAY OF May, 1985.

ATTEST: THE CITY OF GREELEY, COLORADO

/s/ GAYLE VOSS
City Clerk

By: /s/ MIKE LEHAN
Mayor

APPENDIX G

WASHINGTON BUSINESS AND OCCUPATION TAX

82.04.050. "Sale at retail", "retail sale"

(1) "Sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers other than a sale to a person who (a) purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person, or (b) installs, repairs, cleans, alters, imprints, improves, constructs, or decorates real or personal property of or for consumers, if such tangible personal property becomes an ingredient or component of such real or personal property without intervening use by such person, or (c) purchases for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or is a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale, or (d) purchases for the purpose of consuming the property purchased in producing ferrosilicon which is subsequently used in producing magnesium for sale, if the primary purpose of such property is to create a chemical reaction directly through contact with an ingredient of ferrosilicon, or (e) purchases for the purpose of providing the property to consumers as part of competitive telephone service, as defined in RCW 82.04.065. There term shall include every sale of tangible personal property which is used or consumed or to be used or consumed in the performance of any activity classified as a "sale at retail" or "retail sale" even though such property is resold or utilized as provided in (a), (b), (c), (d), or (e) above following

such use. The term also means every sale of tangible personal property to persons engaged in any business which is taxable under RCW 82.04.280, subsections (2) and (7) and RCW 82.04.290.

* * * *

(5) The term shall also include the providing of telephone service, as defined in RCW 82.04,065, to consumers.

* * * *

82.04.065. "Competitive telephone service", "network telephone service", "telephone service", "telephone business"

(1) "Competitive telephone service" means the providing by any person of telecommunications equipment or apparatus or service related to that equipment or apparatus such as repair or maintenance service, if the equipment or apparatus is of a type which can be provided by persons that are not subject to regulation as telephone companies under Title 80 RCW and for which a separate charge is made.

(2) "Network telephone service" means the providing by any person of access to a local telephone network, local telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" includes interstate service, including toll service, originating from or received on telecommunications equipment or apparatus in this state if the charge for the service is billed to a person in this state. "Network telephone service" does not include the providing of competitive telephone service, the providing of cable television service, nor the providing of broadcast services by radio or television stations.

(3) "Telephone service" means competitive telephone

service or network telephone service, or both, as defined in subsections (1) and (2) of this section.

(4) "Telephone business" means the business of providing network telephone service, as defined in subsection (2) of this section. It includes cooperative or farmer line telephone companies or associations operating an exchange.

* * * *

82.04.250 Tax on retailers

Upon every person except persons taxable under RCW 82.04.260(8) engaging within this state in the business of making sales at retail, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of forty-four one-hundredths of one percent.

APPENDIX H

NEW MEXICO GROSS RECEIPTS TAX

7-9-3. Definitions. (Effective until July 1, 1988.)

As used in the Gross Receipts and Compensating Tax Act [this article]:

* * * *

F. "gross receipts" means the total amount of money or the value of other consideration received from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico and includes any receipts from sales of tangible personal property handled on consignment but excludes cash discounts allowed and taken, New Mexico gross receipts tax payable on transactions for the reporting period and taxes imposed pursuant to the provisions of the County Sales Tax Act, the County Fire Protection Excise Tax Act, the County Gross Receipts Tax Act, the Municipal Gross Receipts Tax Act or the Supplemental Municipal Gross Receipts Tax Act which are payable on transactions for the reporting period and any type of time-price differential.

* * * *

"Gross receipts" also includes amounts paid by members of any cooperative association or similar organization for sales or leases of personal property or performance of services by such organization and amounts received from transmitting messages or conversations by persons providing telephone or telegraph services, including interstate and international messages or conversations that either originate or terminate in New Mexico and are billed to a New Mexico telephone number or account;

7-9-4. Imposition and rate of tax; denomination as "gross receipts tax".

A. For the privilege of engaging in business, an excise

tax equal to four and three-fourths percent of gross receipts is imposed on any person engaging in business in New Mexico.

B. The tax imposed by this section shall be referrred to as the "gross receipts tax".

* * * *

7-9-55. Deduction; gross receipts tax; transaction in interstate commerce. (Effective until July 1, 1988.)

Receipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States constitution.

Receipts from transmitting messages or conversations by radio other than from one point in this state to another point in this state and receipts from the sale of radio or television broadcast time when the advertising message is supplied by or on behalf of a national or regional seller or advertiser not having its principal place of business in or being incorporated under the laws of this state, may be deducted from gross receipts. Commissions of advertising agencies from performing services in this state may not be deducted from gross receipts under this section.

7-9-55. Deduction; gross receipts tax; transaction in interstate commerce. (Effective July 1, 1988.)

Receipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States constitution.

Receipts from transmitting messages or conversations by telegraph, telephone or radio other than from one point in this state to another point in this state and receipts from the sale of radio or television broadcast time when the advertising message is supplied by or on behalf of a

national or regional seller or advertiser not having its principal place of business in or being incorporated under the laws of this state, may be deducted from gross receipts. Commissions of advertising agencies from performing services in this state may not be deducted from gross receipts under this section.

7-9-56. Deduction; gross receipts tax; intrastate transportation and services in interstate commerce. (Effective until July 1, 1988.)

* * * *

C. Receipts from providing telephone or telegraph services in this state which will be used by other persons in providing telephone or telegraph services to the final user and thirty-five percent of the receipts of persons providing interstate and foreign telephone or telegraph services from transmitting interstate messages or conversations may be deducted from gross receipts.